Supreme Court, U.S.
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No. 97-1920

In The

Supreme Court of the United States

October Term, 1997

TERESA KILLIAN,

Petitioner,

vs.

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

The parent entity of respondent, Provident Life and Accident Insurance Company is Provident Companies, Inc. There are no nonwholly owned subsidiaries of respondent.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Citations	iii
Statement of The Case	1
A. Course of Proceedings Below	1
B. Statement of Facts	2
Reasons for Denying the Writ	3
I. The Petition Fails To Apprise The Court Of The Primary Basis For The Lower Court's Rulings.	3
II. The Petition Misrepresents The Significance Of The Eleventh Circuit's Ruling In Regard To The Term "Mental Disorder" As It Relates To The Instant Case.	5
III. The Petition Misrepresents The Nature Of The Differences In Rulings From The Various Circuits.	6
IV. The Petition Misstates The Ruling Regarding The Breach Of Fiduciary Duty Claim.	8
Conclusion	9

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Arkansas Blue Cross & Blue Shield, Inc. v. Doe, 22 Ark. App. 89, 733 S.W. 2d 429 (1987) 7

Brewer v. Lincoln National Life Ins. Co., 921 F.2d 150, 154 (8th Cir. 1990), *cert. denied*, 501 U.S. 1238, 111 S. Ct. 2872, 115 L. Ed. 2d 1088 (1991) 7

Childress v Foremost Ins. Co., Inc., 411 So. 2d 124 (Ala. 1982) 6

Kunin v. Benefit Trust Life Ins. Co., 910 F.2d 534 (9th Cir. 1990) 7

Lynd v. Reliance Standard Life Insurance Co., 94 F.3d 979 (5th Cir 1996) 6, 7

Malerbi v. Central Reserve Life of North America Ins. Co., 225 Neb. 543, 407 N.W. 2d 157 (Neb. 1987) 7

Phillips v. Lincoln Nat. Life Ins. Co., 978 F.2d 302 (7th Cir. 1992) 7

Short v American Cast Iron Pipe Co., 961 F. Supp. 261 (N.D. Ala. 1997) 8, 9

Simmons v. Blue Cross & Blue Shield of Greater New York, 144 S.D. 2d 28, 536 N.Y.S. 2d 431 (N.Y. App. Div. 1989) 7

Contents

Page

Rule Cited:

Eleventh Circuit Rule 36-2, 28 U.S.C.A. 5

STATEMENT OF THE CASE

A. Course of Proceedings Below

Teresa Killian originally filed her complaint for relief in Alabama State Court against Provident Life and Accident Insurance Company, Inc. (hereafter "Provident") and her former employer, Southern Company Services (hereafter "Southern Company"). Southern Company properly removed the case to the Northern District of Alabama, with the consent of Provident. During the course of the proceeding, Killian voluntarily dismissed Southern Company as a defendant. (R 1-14).

Killian amended her complaint to add a count against Provident alleging breach of fiduciary duty.

After the completion of discovery, both Provident and Killian filed Motions for Summary Judgment. (R 1-16; R 3-17; R 2-15). The District Court overruled both Motions. (R 1-24).

A trial on the merits occurred on February 3, 1997. On February 21, 1997, the District Court entered a Final Judgment in favor of Provident, applying a de novo standard of review. (R 1-28-29).

Killian moved the District Court for a new trial or judgement notwithstanding the verdict. (R 1-30). The District Court overruled these Motions. (R 1-31).

Killian filed a Notice of Appeal to the Eleventh Circuit and the parties submitted briefs. After oral argument, the Eleventh Circuit affirmed the judgment of the District Court in an opinion dated February 25, 1998, hence this Petition for Certiorari. (App. D-17).

B. Statement of Facts

The instant action involved a bitter factual dispute surrounding Killian's entitlement to long term disability benefits. Teresa Killian's work experience and post secondary education involved a variety of computer and system analysis specialties. Killian went to work for Southern Company Services as a technical writer. It is undisputed that the job of a technical writer involved sedentary work with computer systems. Ms. Killian left her work with Southern Company in 1993, because of health problems associated with her pregnancy.

Killian applied for long term disability benefits with Southern Company Services in 1993. Initially, her claim was denied by Southern Company, but later was approved with retroactive benefits. Later, Southern Company Services entered into an agreement with Provident Life and Accident Insurance Company, Inc. to fully insure all claims arising after March 1, 1995. Further, Provident assumed administration of all existing claims occurring prior to March 1, 1995.

In March, 1995, Killian was notified that Provident was taking over the administration of her claim and requested that Killian provide updated medical information regarding her disability. Thereafter, Provident received an initial form from her attending physician, Dr. Beverly Warren Lynch. Provident found the information given by Dr. Lynch conflicting, confusing and contradictory, and requested that Dr. Lynch give more information on Ms. Killian's disability. (R 5-33-104). Dr. Lynch failed to respond to any further requests from Provident.

After Dr. Lynch failed to respond, Provident authorized an independent medical evaluation with a board certified internist, Dr. Kulback. Dr. Kulback examined Ms. Killian on December 1, 1995. The doctor took a history, performed a physical

examination and reviewed extensive medical records. (Trial Exhibit 9, pp. 15-19). Dr. Kulback authored a five page report which indicated that Ms. Killian was physically able to return to work. An in-house rehabilitation consultant at Provident reviewed the medical findings of Dr. Kulback and gave the opinion that there were jobs, based on Ms. Killian's education, training and experience, which Ms. Killian could perform within Dr. Kulback's limitations. Based on these opinions, Provident terminated Killian's benefits, and this termination of benefits was later upheld by Provident's ERISA appeal process. At all times pertinent to this case, Ms. Killian worked as a homemaker and took care of her two children.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FAILS TO APPRISE THE COURT OF THE PRIMARY BASIS FOR THE LOWER COURT'S RULINGS.

The long term disability plan reviewed in the courts below required petitioner to provide evidence of continuing total disability as defined under the plan. The litigation necessitated the lower courts to sort through numerous disputed factual contentions. It is undisputed, however, that the plan required Killian to establish she was totally disabled under the following definition:

> *TOTAL DISABILITY* — You are considered to be totally disabled when you are unable to work or engage in any type of business because of injury or illness for which you are reasonably qualified by education, training or experience.

(R 4-26 — Exhibit 14).

Killian has never proven her total disability as required and defined by the plan. On the contrary, the independent medical examiner revealed she was physically able to work. Dr. Kulback stated in pertinent part in his December 1, 1995 report that:

> I did not find any physical reasons why [Petitioner] would be unable to return to work on at least a limited basis in a job that did not require more than moderate physical activity. She does not appear eager to return to work, and in her correspondence with the insurance company and with physicians, she reiterated many reasons why she should not return to work.

(App C, pp. 132-142). Also Killian kept her two young children at home and actively participated in various household chores throughout the week. (R5 — 33-27). Because her occupational background was of a sedentary character, she failed to show a physical reason supporting a total disability finding. The District Court ruled that:

> 5. Plaintiff has failed to carry out her duty under the plan of furnishing a certification by a physician that there was a physical reason for her disability, and has failed to show that she was unable to engage in an occupation for which she was reasonably qualified. Thus, plaintiff has failed to propose any set of facts allowing her to be covered under a reasonable interpretation of this plan.

(App C, p. 16a).

The Eleventh Circuit Court of Appeals also recognized that the evidence did not support Killian's claim of total disability, to wit:

> According to Dr. Kulback, Killian's impairment merely requires her to keep a rather sedentary job, which is in line with her education and training as a technical writer.

(App A, p. 7a).

The petitioner's brief attempts to mislead this Court into assuming that the mental and nervous disorder limitation contained in the plan was the sole reason Killian was denied benefits under the plan. This argument fails because the record clearly demonstrates that the mental and nervous disorder limitation was not the sole reason for the denial. While the Courts below stated in effect that the mental or nervous limitations would be sufficient to support the denial, a full reading of the opinions and record clearly reflect that the primary factor in the rulings was that Killian failed to meet her burden of proving she was totally disabled as defined by the clear terms of the plan.

II.

THE PETITION MISREPRESENTS THE SIGNIFICANCE OF THE ELEVENTH CIRCUIT'S RULING IN REGARD TO THE TERM "MENTAL DISORDER" AS IT RELATES TO THE INSTANT CASE.

The instant Eleventh Circuit Court of Appeals decision that the petitioner urges this Court to review is one referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Pursuant to Eleventh Circuit Rule 36-2, 28 U.S.C.A., such unpublished opinions are not considered binding precedent, however, they may be cited as persuasive authority provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition or motion.

Because this case is "unreported" it is, by Eleventh Circuit rule, not even binding upon the Eleventh Circuit except as a persuasive authority. In spite of the decision being unreported, the petitioner asserts that this unreported decision creates an important conflict with the opinions of the Seventh and Ninth Circuits. Petitioner further suggests, both expressly and by implication, that this alleged conflict in the decisions creates a void in the law so great as to necessitate supervisory action by this Court to draft a universal interpretation of the terms "mental and nervous disorders". Even if the Eleventh Circuit decision was reported, there simply is no conflict necessitating supervisory action by this Court.

III.

THE PETITION MISREPRESENTS THE NATURE OF THE DIFFERENCES IN RULINGS FROM THE VARIOUS CIRCUITS.

It is fair to say that in their review of this matter, the Eleventh Circuit found *Lynd v. Reliance Standard Life Insurance Co.*, 94 F.3d 979 (5th Cir 1996), to be, in their words, "instructive". *Lynd's* admonition to examine contract language through the eye of a "layperson" is consistent with the underlying law of Alabama. In *Childress v Foremost Ins. Co., Inc.*, 411 So. 2d 124 (Ala. 1982), the Alabama Supreme Court stated:

> This Court has consistently upheld the fundamental rules of insurance law that any ambiguities in an insurance policy are to be resolved in favor of the insured and that the provisions of the policy must be construed in light of the interpretation that ordinary persons would place on the language used. *Childress* at 126 quoting *Employers Insurance Company of Alabama, Inc. v. Jeff Gin Company*, 378 So.2d 693 (Ala. 1979).

Leaving aside the fact that the Eleventh Circuit's decision in the present case was "unreported", the decision was on sound footing. The issue raised and argued by petitioner is one built on shifting policy language and factual discrepancies. In the various cases cited by petitioner, the language describing words and phrases such as mental illness, conditions, nervous, cause, contributed, caused by, and special provisions are used. In those cited cases, the conditions that are the subject of litigation span the emotional and mental spectrum of known disorders (*i.e.*, congenital encephalopathy, autism, organic brain defect, manic depressive disorder, depression, affective mood disorder, anorexia nervosa, schizophrenia, bipolar disorder and the like.[1] To ask this Court to make a broad sweeping ruling in this area is not the answer. The policy language, facts and mental status of the parties may vary so widely from case to case, that the circuits must necessarily be allowed to forge the devices appropriate in each circuit to resolve these cases individually based on the underlying law of the varying jurisdictions.

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1. *See Lynd v. Reliance Standard Life Ins. Co.*, 94 F.3d 979 (5th Cir. 1996) (major depressive disorder); *Phillips v. Lincoln Nat. Life Ins. Co.*, 978 F.2d 302 (7th Cir. 1992) (congenital encephalopathy); *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534 (9th Cir. 1990) (Autism); *Malerbi v. Central Reserve Life of North America Ins. Co.*, 225 Neb. 543, 407 N.W. 2d 157 (Neb. 1987) (organic brain defect); *Arkansas Blue Cross & Blue Shield, Inc. v. Doe*, 22 Ark. App. 89, 733 S.W. 2d 429 (1987) (manic depressive disorder); *Brewer v. Lincoln National Life Ins. Co.*, 921 F.2d 150, 154 (8th Cir. 1990), *cert. denied*, 501 U.S. 1238, 111 S. Ct. 2872, 115 L. Ed. 2d 1088 (1991) (affective mood disorder); *Simmons v. Blue Cross & Blue Shield of Greater New York*, 144 S.D. 2d 28, 536 N.Y.S. 2d 431 (N.Y. App. Div. 1989) (anorexia nervosa).

IV.

THE PETITION MISSTATES THE RULING REGARDING THE BREACH OF FIDUCIARY DUTY CLAIM.

The petitioner alludes to the fact that the District Court's order did not specifically address the breach of fiduciary duty claim. The petitioner then attempts to explain the district court's reasoning in a separately and subsequently decided case by the district court, *Short v American Cast Iron Pipe Co.*, 961 F. Supp. 261. However, the decision of the Eleventh Circuit in this case does not cite *Short* or even refer to the argument now being alleged by petitioner. In fact, the Eleventh Circuit held:

> Killian's final claim is that Provident breached its fiduciary duty to her when it ordered an independent examination of her condition and terminated her benefits. The District Court's conclusion that the administrator's termination of benefits was proper made it unnecessary for it to reach Killian's fiduciary duty claim. We therefore are left to rely solely upon the two pages of Killian's brief where she argues, but offers nothing to even suggest, that Provident breached its fiduciary duty under ERISA and *Varity Corp. v Howe*, 116 S. Ct. 1065 (1996).
>
> In *Varity*, the Supreme Court concluded that a plan administrator was acting as a fiduciary when he made representations and offered advice to employees about transferring their benefits. *Id.* at 1072-73. Provident never made representations or offered advice to Killian about the status of her benefits. Provident merely invoked one of the provisions of the plan that gave it the right to evaluate Killian's

> condition to ensure that she still qualified for benefits under the plan.
>
> Nothing in the record would support a finding of breach of fiduciary duty.

(App A, pp. 7a-8a).

Because the Eleventh Circuit's decision in the present case was in no way connected with *Short* as alleged by petitioner, there is no arguable basis calling for review by this Court.

CONCLUSION

After careful review of the clarification provided in this brief, this Court should find that there is no compelling reason to grant the Petition for Writ of Certiorari. First, the petitioner has not shown that the unreported decision in the present case is in clear conflict with the decisions of other courts of appeals on the same important matter. In fact, as demonstrated in brief, the Court of Appeals must be left to fashion interpretations on a case by case basis in order to sort through the myriad of types of policy language and mental disturbances that affect some members of our society. The petitioner has not demonstrated how this Court could fashion a universal remedy that could be used in all cases. Further, as demonstrated through the clarification contained in this brief, this case was based on hotly disputed factual issues and the ultimate rulings by the courts below were fashioned only after careful and detailed review of the record which required rulings on such items as issues of credibility and believability of witnesses. A fair reading of the opinions and record below show that the Eleventh Circuit was correct in affirming the judgment of the District Court.

For the foregoing reasons, the order of the United States District Court for the Northern District of Alabama dismissing Teresa Killian's claim against Provident was properly affirmed by the Eleventh Circuit. Granting the Petition for Writ of Certiorari in this case, would therefore serve no purpose.

Petitioner's request for certiorari review should therefore be denied.

Respectfully submitted,

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